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Supreme Court, U.S.
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No. 00-1718

IN THE

# Supreme Court of the United States

KANSAS CITY SOUTHERN RAILWAY COMPANY, INC.,
*Petitioner,*

v.

J.C. JOHNSON AND KERRY LYNN JOHNSON,
*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of Mississippi**

## REPLY BRIEF OF PETITIONER

STUART G. KRUGER
BAKER, DONELSON, BEARMAN & CALDWELL
4268 I-55 North
Jackson, Mississippi
(601) 351-2400

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
JENNIFER M. RUBIN
SIDLEY AUSTIN BROWN & WOOD
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

*Counsel for Petitioner*

* Counsel of Record

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## REPLY BRIEF OF PETITIONER

Kansas City Southern Railway Company, Inc.'s ("KCS") petition raises important federal questions regarding preemption by the Federal Rail Safety Act of 1970 ("FRSA") and 23 C.F.R. § 646.214: may the Mississippi Supreme Court create a special state-law evidentiary rule to evade FRSA preemption or hold that alleged changed circumstances at a grade crossing terminate FRSA preemption. Respondents raise misguided objections to this Court's jurisdiction and misrepresent the record in an unavailing attempt to deflect the Court's attention from the issues at hand. The Court should grant certiorari in order to resolve the significant federal questions presented, remedy confusion resulting from the split between the Mississippi Supreme Court and federal courts, including the Fifth Circuit, and vindicate the principle that state courts may not impair federal rights.

1. Respondent's claim that the preemption issues are not before this Court are frivolous. First, petitioner did not waive its preemption arguments before the Mississippi Supreme Court. Petitioner's appellate brief included the issue of whether "federal and/or state statutes and/or regulations preempt Mr. Johnson's claim that KCS was negligent for failing to provide additional or different warning devices at the subject crossing," and fully briefed *Easterwood* preemption in the argument section. Appellant's Br. 1, 17-18. Moreover, petitioner renewed its summary judgment preemption defense in its motion for judgment notwithstanding the verdict, an order which respondents acknowledge was appealed. Opp. 5. Mississippi procedure does not require an appellant to list separately the order denying summary judgment in its notice of appeal in order to preserve issues that were renewed in the JNOV motion. Finally, petitioner cited the affidavit of Newton McCormick, the long-time State Rail Engineer of the Rails Division of the Mississippi Department of Transportation ("MDOT"), and its incor-

porated documentary evidence, see R. 406 ¶ 4, to prove federal funding in both its main and reply appellate briefs.[1]

Respondents' waiver argument is also misplaced. As they concede, Opp. 6, this Court may review "an issue not pressed so long as it has been passed upon" by the court below. *United States* v. *Williams*, 504 U.S. 36, 41 (1992). To comply with *Williams*, respondents claim that "the Mississippi Supreme Court did not consider the issue ... [of] the evidentiary value of the McCormick affidavit." Opp. 6. But KCS seeks review of an express holding: that "documentation" is necessary to establish federal preemption. Pet. App. 7a. Respondents' objections are not even colorable.

2. Respondents concede that there is no *federal* rule that FRSA preemption can only be proved with documentation, and that the Mississippi Supreme Court imposed that requirement as a matter of *state* law. Nonetheless, respondents claim that the invocation of a state rule precludes review by this Court. Opp. 4-5. This argument likewise fails.

A state court's denial of a federal right or defense based on state law deprives this Court of jurisdiction only if the state law ground is "adequate and independent," and "a state procedural ground is not 'adequate' unless the procedural rule is 'strictly and regularly followed.'" *Hathorn* v. *Lovorn*, 457 U.S. 255, 262-63 (1982). Thus, a state law rule will be regarded as "inadequate" if it is "not fairly supported by state law because the requirement is novel or has been

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[1] *See* Appellant's Br. 18 (citing McCormick Aff., R. 405-06, to show that federal funds were used to install the advanced warning sign at the Johnson Quarters Road crossing with Federal Highway Administration approval); Appellant's Reply Br. 10, 11 (same). Petitioner included the summary judgment order on appeal, Appellant's R. Excerpts 26, and attached the affidavit and its accompanying documents to its motion for rehearing. *See* Mot. for Reh'g 6-7, 7 n.2, and Ex. 1. Notably, respondents addressed the affidavit and attached documents in their response to the motion for rehearing but did not assert waiver. *See* Appellees' Resp. to Mot. for Reh'g 7.

inconsistently applied." Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts And The Federal System* 580 (4th ed. 1996) (emphasis omitted); see *Staub* v. *City of Baxley*, 355 U.S. 313, 319 (1958); *Reich* v. *Collins*, 513 U.S. 106, 113 (1994). Unquestionably, the creation of special state evidentiary rules for federal preemption claims presents a federal question. *Burks* v. *Lasker*, 441 U.S. 471, 477 (1979) ("Legal rules which impact significantly upon the effectuation of federal rights must ... be treated as raising federal questions.").

3. The petition demonstrates that the Mississippi Supreme Court denied preemption based on a novel rule not supported in existing state law; its ruling on McCormick's testimony is contrary to established Mississippi law that uncontradicted testimony that is not inherently incredible must be taken as true for summary-judgment purposes. Pet. 15-17.

Citing authority that summary judgment cannot be based on "conclusory affidavits," Respondent claims that the lower court did not apply a new rule. Opp. 6-7. This is another red herring. McCormick's affidavit and his trial testimony were not conclusory. *United States* v. *Robinson*, 78 F.3d 172, 174 (5th Cir. 1996) (affidavit is conclusory if it attests to generalities or states a legal conclusion); *Kelley* v. *Frederic*, 573 So. 2d 1385, 1387 n.2 (Miss. 1990). Rather, he testified, based on personal knowledge as MDOT's rail engineer and as a member of the diagnostic team that placed signs throughout the state in the early 1980s, and supported by documentation, that the advanced warning sign at the Johnson Quarters Road crossing was installed with federal funds as part of a 1981-82 project. R. 405-09, Trial Tr. 141-42, 149-52.

More fundamentally, the lower court did not use the rule against conclusory affidavits to reject McCormick's testimony. Rather, it used a new, categorical rule specific to FRSA preemption to reject the testimony: "[w]e will not rule that federal funds have been spent where no documentation was produced in support thereof." Pet. App. 7a.

Because the lower court created a novel rule specific to FRSA preemption, and did not exclude McCormick's testimony as conclusory or lacking personal knowledge, respondents' extended argument, Opp. 9-13, that McCormick lacked personal knowledge of federal funding of the warning device because it was supposedly not installed is immaterial. But this argument is also both wrong (the project record clearly shows an installation of the warning sign[2]) and improper. Respondents never contradicted McCormick's sworn and unequivocal testimony at the summary judgment stage (or at trial) when they had the opportunity to do so, and instead made policy arguments (ultimately rejected by *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000)) regarding whether a diagnostic study was necessary to trigger preemption and whether the fact that the sign was allegedly missing in late 1995[3] precluded preemption. Indeed, at summary judgment, on appeal, and in response to petitioner's motion for rehearing before the Mississippi Supreme Court, respondents repeatedly *conceded* that federal funds were used to install the advanced warning sign at issue in this case.[4]

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[2] Respondents' factual challenges to McCormick's testimony and documentary support, even if permissible, are weak. First, respondents ignore that the trial court rejected their challenge to McCormick's ability to testify on these issues. *See* Pet. 13; Trial Tr. 148. Respondents' challenge to the documents offered by McCormick also strains logic, for the documents make clear in one column that an advance warning sign was installed at the Johnson Quarters Road crossing and, in another column, that no other warning device (stop signs or flashing lights) was installed at the crossing. It is also absurd to claim that McCormick's testimony was inadequate and not based on personal knowledge, given that he was MDOT's head engineer, personally participated in the project, and knew the sources of funding in that era. *See* Pet. 13-14 & nn.12, 13.

[3] *See infra* at 8 n.8.

[4] *See* R. 555 (acknowledging at summary judgment that "federal money [was] spent in 1982 to erect one 'advance warning sign' at the Johnson Quarters Road crossing"); R. 560 (acknowledging that "a few dollars of federal money may have been used to erect an advance warning sign at

Respondents cannot contest the credibility or the personal knowledge of the witness for the first time in this Court. His testimony was uncontradicted at trial (and on appeal), and the Mississippi Supreme Court treated it as such.

Thus, the question presented is whether the Mississippi Supreme Court can create a special evidentiary rule that only documentation, but not uncontradicted testimony, can establish FRSA preemption. Under Mississippi law uncontradicted evidence sufficient on its face[5] is accepted as true. See Pet. 16-17 (collecting cases). A straightforward application of that rule, in light of this Court's decisions in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993) and *Shanklin*, compels judgment as a matter of law for KCS on the issue of federal preemption.

The Mississippi Supreme Court's special requirement of documentary evidence in FRSA preemption cases falls within the category of state rules of procedure and evidence purposefully biased against federal rights and defenses. See *McKnett* v. *St. Louis & S.F. Ry.*, 292 U.S. 230, 234 (1934); Pet. 17-18. This novel rule is especially pernicious, given the

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Johnson Quarters Road"); Appellees' Br. 23-24 (acknowledging that "a few dollars may have been used to erect an advance warning sign at Johnson Quarters Road" and arguing against preemption because "federal officials did not determine that the passive warning device (one advance warning sign) installed at the Johnson Quarters Road crossing was adequate to protect the traveling public"); Appellees' Resp. to Mot. for Reh'g 8 (conceding "that once upon a time that sign, paid for with an undetermined amount of federal money, was standing upright").

[5] *See Burton* v. *Choctaw County*, 730 So. 2d 1, 3-4 (Miss. 1997) (stating that "affidavits and other evidence must be sworn, made upon personal knowledge, and show that the party providing the factual evidence is competent to testify); *Palmer* v. *Biloxi Reg'l Med. Ctr.*, 564 So. 2d 1346, 1356 (Miss. 1990) ("Mere allegation or denial of material fact is insufficient to generate a triable issue of fact and avoid an adverse rendering of summary judgment."). As discussed below, a straightforward application of federal law identical to Mississippi law also dictates that KCS should have been granted judgment as to federal preemption.

potential for conflict with 23 U.S.C. § 409, which limits the *admissibility* of certain categories of documentary evidence bearing on railway crossing safety. The unique evidentiary rule created below will thwart the rational operation of FRSA preemption; this Court both may and should resolve the question presented in order to vindicate the Supremacy Clause and Congress's express intent.

4. Once respondents' irrelevant claims are put aside, it is clear that the decision below creates an irreconcilable split on the first question presented between the Mississippi Supreme Court and the Fifth Circuit, which includes Mississippi. The cases forming the split both involve McCormick's uncontradicted testimony, buttressed by project records, as to federal funding for installation of passive warning devices for FRSA preemption purposes—yet the Mississippi Supreme Court rejected his testimony, while the Fifth Circuit ruled that the testimony compelled judgment as a matter of law. Compare Pet. App. 7a, with *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 386 (5th Cir. 1995).[6]

Moreover, contrary to respondents' claims, Mississippi and the Fifth Circuit apply the same law in analyzing motions for

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[6] Respondents cite *Hester*'s statement that "[t]he documentary evidence clearly demonstrates that federal funds did participate in the installation," but the Fifth Circuit was using the term "documentary evidence" to refer to both "Mississippi Department of Transportation (MDOT) records and the affidavit of Newton McCormick." 61 F.3d at 386 & n.7. There is no basis for respondents' surmise that the MDOT records were different in the two cases. When state highway agencies seek federal funding to install passive devices (such as crossbucks and warning signs) at rural crossings of the kind at issue in this case, *Hester*, *id.* at 386 & n.6, and *Shanklin*, 529 U.S. at 350, they propose a project to install signs for large numbers of crossings; in approving such projects, the Federal Highway Administration allocates funds for the project as a whole, not on a crossing-by-crossing basis, *see, e.g.*, *Shanklin*, 529 U.S. at 350 (project covering 196 grade crossings in 11 counties). Indeed, in both *Hester* and this case, the signs at issue were installed as part of federally funded MDOT projects from 1981-83. *See* R. 405 ¶ 2; *Hester*, 61 F.3d at 386.

summary judgment,[7] and both systems permit judgment as a matter of law, see Miss. R. Civ. P. 50; Fed. R. Civ. P. 50. Each system has the same rules regarding affidavits, compare Miss. R. Civ. P. 56(e), with Fed. R. Civ. P. 56(e), and similarly condemns conclusory statements, compare *Kelley*, 573 So. 2d at 1387 n.2, with *Robinson*, 78 F.3d at 174. Thus, the lower court, by failing to apply rules regularly applied by it and the Fifth Circuit, fashioned an exception unique in both the federal and state courts in Mississippi, created a conflict with the Fifth Circuit, and caused inconsistency in an area of law where national uniformity is both necessary and mandated by Congress.

5. In the second question presented, petitioner showed that the Mississippi Supreme Court's alternative holding—that there could be no preemption on the basis of a federally funded advanced warning sign because "there is no evidence of its existence," Pet. App. 7a—violated this Court's holding in *Shanklin*, 528 U.S. at 358-59, that changed circumstances at the crossing do not terminate federal preemption of the railroad's duty under state tort law. See Pet. 19-23.

Respondents' rejoinder that petitioner is "putting words in the Mississippi Supreme Court's mouth," Opp. 13, and that the court below based its holding on "a lack of evidence in this case that a federally funded warning device was ever installed at the crossing," *id.* at 14, is specious. First, this was an alternative holding to the holding that McCormick's testimony was legally insufficient: *i.e.*, that *even if* federal funds participated in the installation of a warning device, as McCormick testified, there was no preemption because no

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[7] *Compare Travis* v. *Stewart*, 680 So. 2d 214, 216-17 (Miss. 1996), *with Robinson*, 78 F.3d at 174. The rules mandate that "[t]he judgment sought *shall* be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c) (emphasis added); Fed. R. Civ. P. 56(c).

warning device existed. Pet. 20. This is clearly a changed-circumstances holding in contravention of *Shanklin*.

Second, the only evidence (other than McCormick's) of signs at the crossing was evidence postdating the accident.[8] The holding that there was no evidence of a warning sign, Pet. App. 7a, must refer to the time of the accident.

Third, respondents conceded throughout the case that the advanced warning sign was installed at the crossing but argued that changed circumstances, *i.e.*, that the sign was allegedly not in place on the date of the accident, precluded FRSA preemption.[9] Thus, contrary to respondents' assertions of surprise, one issue on appeal was whether alleged changed circumstances—under the control of the state, and not the railroad—could terminate FRSA preemption created when a warning device is installed with federal funds.

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[8] The only evidence that the advanced warning sign was missing *at any time* was a December 1995 plat survey—five months after the collision at issue. Respondents fault petitioner for not putting on evidence that "anyone actually saw the sign after it allegedly was installed." Opp. 14. But McCormick unequivocally testified at trial that the sign was installed with federal funds. Trial Tr. 149. The claim that the sign never existed is an argument that itself never existed until respondents asserted it before this Court to justify the Mississippi court's rule.

[9] *See, e.g.*, R. 555 ("Plaintiffs' threshold position is that KCS has produced no evidence that the sign presumably erected in 1982 was still in place at the time of the crash in 1995.") (emphasis removed); Appellee's Br. 26 ("[I]t was incumbent upon KCS at trial to offer evidence that the advance warning sign was actually operational at the time of the collision.") (emphasis removed) (citing evidence that advance warning sign was not in place in December 1995, five months after collision at issue in this case); *id.* at 28 (stating that "[t]he conditions at many railroad crossings change over time" and that changed conditions should be considered in evaluating federal preemption claims); Appellee's Resp. to Mot. for Reh'g 7-8 (discussing alleged changed circumstances and asserting that sign must be both "'installed *and* operating' at the time of the accident" for federal preemption to apply).

6. Beyond trying to create baseless factual disputes or otherwise insulate this case from review, respondents neither address nor undermine the arguments favoring certiorari. While all cases involving federal preemption implicate the Supremacy Clause, U.S. Const. art. VI, § 2, the Mississippi Supreme Court's decision to create a special rule in order to defeat federal preemption particularly implicates the interplay between federal and state courts and the law which they apply. Indeed, this Court has often granted certiorari in order to protect federal statutes from discriminatory treatment by state courts, see Pet. 17-18 (collecting cases), and to prevent "state courts [from] dissociat[ing] themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source," *Howlett ex rel. Howlett* v. *Rose*, 496 U.S. 356, 371 (1990).

Similarly, the lower court's conclusion that changed conditions affecting a warning device installed with federal funds may terminate preemption undermines federal law and Congress's goal of "national[] uniform[ity]" in the area of railway safety. 49 U.S.C. § 20106. It also presents an insoluble problem for railroads: if the decision below stands, railroads will be unable either to rely on warning devices deemed adequate under FRSA, Section 646.214, and *Shanklin*, or to ensure that the warning devices are properly maintained. See Pet. 22-23 (noting that Federal Highway Admin., U.S. Dep't of Transp., *Manual on Uniform Traffic Control Devices for Streets and Highways* (1988) and Mississippi state law vest sole authority in state roadway agencies to place and maintain traffic control devices). In light of *Shanklin* and of the myriad problems that will occur if railroad tort liability turns on a state or locality's failure to maintain warning devices on public roads, this Court should grant certiorari in order to affirm that *Shanklin*'s conclusion that changed circumstances do not affect FRSA preemption, see *Shanklin*, 529 U.S. at 358, applies where a warning device has allegedly changed.

* * * *

As Congress recognizes, railway safety requires national uniformity in order to ensure that all involved entities know who is responsible to act in a given context in order to ensure the safety of all who use railway-highway intersections. Faced with a person injured at such an intersection, the Mississippi Supreme Court sought to evade federal preemption in order to place liability on KCS. Thus, as respondents concede, see Opp. at 18; see also Trial Tr. 651-52 (arguing for active signalization instruction), the trial court submitted to the jury the question of whether KCS should have placed active warning devices (such as gates and flashing lights) at the Johnson Quarters Road crossing.[10] The Mississippi Supreme Court's decision does not merely treat this particular railroad unfairly in this particular case. Rather, if permitted to stand, the lower court's decision will contribute to uncertainty by creating disparity in treatment across the country and between federal and state courts, while also undermining the supremacy of federal law. This Court should act to protect the important goals and principles underlying federal preemption in the area of railway safety.

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[10] Respondents' claim that there are other possible grounds for the verdict, Opp. 17-18, is irrelevant; petitioner's objection is to the jury instruction allowing liability for inadequate devices. *See Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919) ("In jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury."). This Court frequently receives, and rejects, in tort cases such objections to this Court's review. *See, e.g., Shanklin*, 529 U.S. at 351; Resp't Pet. Opp. at 8-9, *Shanklin*, 529 U.S. 344 (2000) (No. 99-312).

Respectfully submitted,

STUART G. KRUGER
BAKER, DONELSON, BEARMAN & CALDWELL
4268 I-55 North
Jackson, Mississippi
(601) 351-2400

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
JENNIFER M. RUBIN
SIDLEY AUSTIN BROWN & WOOD
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

*Counsel for Petitioner*

* Counsel of Record

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